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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

ALBERTSON'S INC.

and

LOCAL 1564, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO — Cases 28-CA-17671, 28-CA-17859, 28-CA-18181

and

LOUIS E. SAAVEDRA, An Individual

*Paul R. Irving, Esq.*
for the General Counsel.

*Thomas L. Stahl, Esq.*
*Rodey, Dickason, Sloan, Akin & Robb, P.A.,*
of Albuquerque, New Mexico
for the Respondent.

DECISION

I. Statement of the Case

Thomas M. Patton, Administrative Law Judge. These cases were tried in Albuquerque, New Mexico on June 25 – 28, 2002, August 27 – 29, 2002 and February 11, 2003. The charge in case 28-CA-17671 was filed by Local 1564, United Food and Commercial Workers International Union, AFL-CIO (the Union) on January 9, 2002 and was amended on April 30, 2002. Louis E. Saavedra filed the charge in case 28-CA-17859 on April 3, 2002. The charge in case 28-CA-18181 was filed by the Union on September 12, 2002. The charges allege violations of Section 8(a)(1), (3), (4) and (5) of the National Labor Relations Act (the Act) by Albertson's, Inc. (the Respondent or Employer).

An initial complaint issued in case 28-CA-17671 on April 30, 2002. A consolidated complaint issued in cases 28-CA-17671 and 28-CA-17859 on May 31, 2002. A hearing

concerning only the issues in those cases was held on June 25 – 28, 2002 and August 27–29, 2002. [1] The General Counsel and the Respondent filed post-hearing briefs in cases 28-CA-17671 and 28-CA-17859 on November 7, 2002.

On January 15, 2003, the General Counsel filed with the Associate Chief Administrative Law Judge a motion to reopen the record in cases 28-CA-17671 and 28-CA-17859 and to consolidate them for hearing with case 28-CA-18181. A complaint in that case had issued on October 4, 2002. The motion was referred to me for ruling. On January 28, 2003, I ruled that cases 28-CA-17671 and 28-CA-17859 would be reopened and consolidated with case 28-CA-18181 for the limited purpose of permitting all the cases to be heard by the same judge. My order stated that it did not grant leave to amend the complaint or answer, introduce additional evidence or make additional arguments concerning the merits in Cases 28-CA-17671 and 28-CA-17859. Any additional briefs were limited to the issues in Case 28-CA-18181. A hearing regarding the issues in case 28-CA-18181 was held on February 11, 2003.[2]

On the entire record[3], including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following:

## II. Findings of Fact

### A. Jurisdiction

Albertson's, Inc. is a corporation engaged in the retail sale of groceries and other merchandise in various states of the United States, including Store 917 in Albuquerque, New Mexico, the only facility involved in this proceeding. The Respondent admits, the record establishes and I find that the Respondent meets the Board's standards for asserting jurisdiction and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[1] At the hearing, the consolidated complaint was amended to allege that Respondent violated Section 8(a)(1) and (3) by issuing a written warning to employee Louis Saavedra on November 12, 2001 and that the Respondent violated Section 8(a)(1) by interrogating employees on June 21, 2002.

[2] On October 28, 2002, the Respondent filed a Motion for Remedies Regarding Witness Intimidation, citing Board Rule 102.35(a)(6). On November 4, 2002 the General Counsel filed a response opposing the motion. The Respondent then filed a reply to the General Counsel's response on November 7. I am not convinced that I have the authority to reach the merits of the Respondent's motion or to grant the requested relief. Assuming, without deciding, that I have such authority, I find that it would not effectuate the purposes of the Act to reach the merits of the motion in the circumstances of these cases. The Respondent's motion, the General Counsel's response and the Respondent's reply are made a part of the record.

[3] The transcript is corrected as follows: Page 1039, line 1 the word "Ed" is corrected to read "it"; transcript page 1039, line 2, is corrected to read, "Q. Can what stay between you and me?"; transcript page 354, line 21, the name "Alan Kriskos" is corrected to read "Alan Frescus". The transcript index, volume IV, incorrectly identifies Anthony Martinez as "Anthony Rodriguez".

B. The labor organization

The Respondent admits, the record establishes and I find that Local 1564, United Food and Commercial Workers International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

C. The alleged unfair labor practices

1. Background

All the alleged unfair labor practices relate to employees in the meat department at Store 917. The Union represents the approximately 10 employees in meat department (the Unit). The meat department includes a meat deli section and a "butcher block" custom meat section. At the time of the hearing there was no labor agreement in effect. The most recent contract expired on October 27, 2001. There is no contention that the Respondent has refused to negotiate in good faith regarding a new contract.

The Unit includes meatcutters, apprentice meatcutters, meat wrappers, deli clerks, a butcher block supervisor and butcher block clerks.[4] The Employer admits that the Union is the Section 9(a) collective bargaining representative of the Unit.

L.C. Weathersby is the store director and the highest-level manager at Store 917. At the time of the alleged unfair labor practices the supervisor of the meat department employees was head meat cutter Angelo Trujillo (also called meat department manager). Weathersby is Trujillo's immediate supervisor. The parties agree, the record establishes and I find that Weathersby and Trujillo are supervisors within the meaning of Section 2(11) of the Act.

The parties agree, the record establishes and I find that at the relevant times Trujillo was a member of the Unit and that his wages and benefits were set through collective bargaining and are specifically addressed the expired collective-bargaining agreement. When he transferred to Store 917 in June 2001, Trujillo became a member of the Union.

The complaints allege violations of Section 8(a)(1) of the Act by threats, interrogation and promises of benefits by Trujillo on several occasions and by threats on one occasion by store director Weathersby. The complaints further allege discrimination against employees in violation of Section 8(a)(1) and (3) of the Act by decisions made regarding work assignments and scheduling, the issuance of warnings and the ordering of an employee's spouse to leave the store. Some of the alleged acts of discrimination are also alleged to be violations of Section 8(a)(1) and (4) of the Act. It is also alleged that the Employer violated Section 8(a)(1) and (5) of the Act by refusing to allow an employee to claim the hours of a less senior employee and by prohibiting employees from photocopying work schedules.

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[4] The collective-bargaining unit is described in the expired labor agreement as follows:

> [A]l meatcutters and meatwrappers employed by the Employer in the meat department of its supermarket located at 1625 Rio Bravo Boulevard S.W., Albuquerque, New Mexico; excluding all other employees, including other food store employees, guards, watchmen, professional employees, and supervisors as defined in the Act…[description of the Union's jurisdiction claims].

The wage classifications in the contract are head meatcutter, assistant head meatcutter, meatwrappers, meat stocker and butcher block, and butcher block supervisor..

Trujillo worked at Respondent's Store 937 in Albuquerque as assistant manager before he was transferred to Store 917. The meat department employees at Store 937 are not represented. On June 16, 2001,[5] Trujillo was promoted to meat market manager and was assigned to work at Store 917, replacing Jack Salmon, who was transferred to another store. There has been no contention and there is no evidence that Trujillo's move to Store 917 was motivated by union considerations. At Store 917 Trujillo assumed responsibility for the overall operation of the meat department. He independently schedules employees, assigns their work, orders product and is responsible for the display of the product. There are no other Section 2(11) supervisors who work in the meat department. [6]

Under the Employer's management system Trujillo receives quantified objectives weekly from higher management above the store level that Trujillo is individually responsible for meeting. The sales in the meat department and the ratio of employee hours to sales are critical elements in the evaluation of his performance. In addition to his management and supervisory duties, he cuts meat and performs other unit work. Trujillo is expected to work eight hours a day, six days a week.

Trujillo has about 12 years experience at the trade and about four years with Albertson's. He had worked at Store 937 prior to it being acquired by the Respondent as a going business. Following Respondent's acquisition of Store 937 Trujillo received training in Albertson's methods of operation. Trujillo also attended training classes related to career advancement opportunities.

Trujillo worked under meat department manager Lisa Goodman at Store 937 during the final two years before he transferred to Store 917. When Trujillo came under Goodman's supervision she trained him in scheduling, ordering and the inventory system. His training included learning the duties of the various department employees, with an emphasis on working as a team to keep the display counters well stocked. Trujillo worked as acting manager when the meat department manager at Store 937 was absent or on vacation.

Much of the case involves Trujillo's supervision of Store 917 meat department employee Bernadiene Brill. Brill has worked at Store 917 for 13 years as a meat wrapper. Brill ordinarily works less than 40 hours per week and is classified as a part-time employee. Brill is the only meat wrapper at the store. Under the collective-bargaining agreement, meatcutters are allowed to perform any task in the meat department. The meatcutters perform Brill's meat wrapper duties when she is not present.

In 1997 Brill filed an unsuccessful grievance in an attempt to be classified as a full time employee. Brill was active in organizing Store 917 and was designated steward by the Union, even though the labor agreement specified that the steward would be a full time employee. Brill was present during contract negotiation meetings, including those for the last expired agreement, as well as negotiations for a successor agreement to the last contract. The evidence does not show that she took an active roll in negotiations.

About two weeks after Trujillo began working at Store 917, he discussed fringe benefits with Brill. He knew that Brill was the Union steward. In their discussion she told him that he would be under the Union retirement plan, rather than the 401(k) plan he had participated in at

[5] All dates in this decision are June 2001 through May 2002 unless otherwise indicated.

[6] It has not been contended and the evidence does not show that the butcher block supervisor is a Section 2(11) supervisor.

Store 937. Trujillo was not pleased by this change and in July he sought to interest other meat department employees in decertifying the Union. He testified that this was a personal decision by him. There is no evidence that higher management was aware of Trujillo's decertification efforts until August, when Trujillo told Weathersby that he had spoken to employees, including Brill, about going non-union. Weathersby told Trujillo at that time that he had the right to express his opinion. There is no evidence that Weathersby or other Employer agents otherwise encouraged or ratified Trujillo's efforts.

The General Counsel and the Employer agree that the relationship between Trujillo and Brill began well, but then deteriorated. Trujillo was sometimes unpleasant in his supervision of Brill. The General Counsel contends that the reasons for Trujillo's antipathy for Brill included Trujillo's hostility to the Union, Brill's opposition to decertification and the filing of unfair labor practice charges against the Employer. The Employer argues that the credible evidence does not support the General Counsel's contention and that the evidence demonstrates that the real reason was Brill's job performance, including her resistance to Trujillo's supervision and his management decisions. For reasons that will be discussed, the weight of the evidence does not support the position of the General Counsel and does support the Employer's position.

On October 18, nine days before the contract was to expire, the Union filed a Section 8(a)(1) and (3) charge against the Employer in case 28-CA-17522, alleging that Trujillo violated the Act, "By approaching Bernadiene Brill and asking for her help in voting the Union out of the store, asking her to contact coworkers in an effort to see whether there was support for his effort to get rid of the Union, by making threatening remarks to Ms. Brill, and by discriminating against her for failing to cooperate with his decertification campaign." On October 23 the Employer sent a letter to Trujillo advising him of the charge that had been filed and stating that the Employer could not become involved in any attempts by Trujillo to determine the amount of union support in the store. The letter stated that while Trujillo was free to express his opinions on the Union to the employees, it must be done in a non-threatening and non-intimidating manner. On November 1, that charge was amended to add a Section 8(a)(4) allegation of retaliation against Brill for the filing of the charge. On December 21, the charge was withdrawn. On January 9, the charge in case 28-CA-17671 was filed.

## 2. Evidence of statements alleged to have violated Section 8(a)(1) and preliminary conclusions

### a. Alleged statements by Trujillo in late July

The consolidated complaint in cases 28-CA-17671 and 28-CA-17859 alleges as follows:

> 6(a) In late July 2001, on a specific date presently unknown to the undersigned, but which date is known to the Respondent, the Respondent, by Angelo Trujillo, herein called Trujillo, at the Respondent's facility, threatened its employees with unspecified reprisals if they informed anyone that Trujillo was soliciting their assistance in decertifying the Union as their collective-bargaining representative.
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> 6(b) In late July 2001, on a specific date presently unknown to the undersigned, but which date is known to the Respondent, the Respondent, by Trujillo, at the Respondent's facility, threatened employees with unspecified reprisals if employees did not follow his wishes regarding decertifying the Union as their collective-bargaining representative.

> 6(c) In late July 2001, on a specific date presently unknown to the undersigned, but which date is known to the Respondent, the Respondent, by Trujillo, at the Respondent's facility, interrogated its employees about whether other employees supported the Union.
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> 6(d) In late July 2001, on a specific date presently unknown to the undersigned, but which date is known to the Respondent, the Respondent, by Trujillo, at the Respondent's facility, threatened employees with unspecified reprisals if they did not wish to decertify the Union as their collective-bargaining representative.

These four allegations address a single conversation between Trujillo and Brill, with no other person present. In late July, Trujillo initiated a discussion with Brill about decertifying the Union. The conversation occurred in the meat cooler at Store 917. Brill and Trujillo testified regarding the conversation. The evidence regarding the conversation is central to the case it will be described in detail. Brill testified as follows:

> Angelo asked me if he could talk to me privately.… He had told me that he can get into trouble asking me this, but he said if it got out he would know who had said anything, but he asked me how I felt about the Union. I told him that I was happy with it. He asked me how I felt about Teresa (Phon.) and Jim with the Union.… Teresa Martinez is the butcher block supervisor, and then Jim Lopez is the meat deli…. We were talking about the Union and the benefits and I had explained to him that my husband is ill. He's got a terminal illness. It's Wagner's Granulelimitosis (phon.), and that I couldn't afford to lose my insurance because of other companies picking up a pre-existing condition. He then told me he would see about getting me a 1-800-number for Albertsons to see if -- how they -- if they would be able to pick up his condition. I then told him that I really wasn't interested at this time [in going nonunion] and he asked me if I would still talk to Teresa Martinez and Jim Lopez and also another employee Anthony Martinez. He told me that Anthony Martinez would more than likely do whatever I asked being that he was my nephew and I asked, I said what about Merrick Dean (phon.), and -- because he was in the cutting room at the time…. He said he wasn't too worried about Merrick being that if everyone else voted against the Union, his vote wouldn't matter and that he felt that being that Louis Savertra (phon.) had just transferred into our meat department, that he wouldn't probably want to lose his benefits from being in a non-union store, and he also indicated to me that he had a 401K that he didn't want to lose. Angelo Trujillo had said he had a lot of money invested in the 401K and he didn't want to lose it…. I told him that I would ask them and that's all that I said. I'd ask them.

Trujillo described a different version of the conversation. His testimony was as follows:

> I did talk to her, it was in the meat cooler…. I asked her, hey, Berna, can I ask you a question, and she said sure. And I say, you know, do you support the Union, and she told me, while, you know, Jack was here, and I said, well, you know, Jack isn't here, you know, any more. And I went ahead and, you know, asked her, you know, if she felt that everybody was happy…..[S]he ... ran down the list on … who supported and who didn't…. [S]he said Jim [Lopez] and Theresa [Martinez] will do whatever I say…. And she told me she didn't know about Christine [Ortega] and Denise [Gonzalez], and -- oh, and Anthony [Martinez]. You know, he'll do what I say….She said it would take a vote. And I said, oh, really, …and I also told her that, okay, well, you know, and I just said, well can it stay between me and you?

Trujillo testified that he spoke with other meat department employees regarding their satisfaction with the Union, but denies that he threatened them.

Brill testified that she had two follow-up conversations with Trujillo. She testified as follows:

> A few days had passed by and he asked me if I had asked them yet. I had told him no because he had earlier told me in our conversation that he didn't want me saying anything to anybody and so that's how I took it, and he said no, that's not what I meant. I want you to talk to them about it. So that day [Teresa Martinez, Jim Lopez and Brill] took lunch together… While we were at lunch, I had to explain to them what Angelo had asked me and what he had wanted to do with the market. And Jim Lopez said well why did he come to a union, if he didn't want -- a union store, if he didn't to be in a union is what he had told me, and I said I don't know. He just wanted me to get your opinion on how you felt about voting the Union out. At the time, they both told me that they didn't want the Union out of the store that they were both happy with the way things were going.… It was a couple of days later. While we were at work, I was on the clock. I was working on the case when [Trujillo] came and asked me if I'd talked Teresa and Jim, and I told him I did but that he wasn't going to like the answer I was going to give him…. [H]e asked me what did they say, and I let him know that at the time, they weren't interested, and he asked me well, did you tell them about the 401K, and I said I talked to them about it, but Angelo, everyone's happy with the way things are.

Trujillo denied having the two follow-up conversations described by Brill. He testified that in the conversation he had with Brill he recalled no mention of health insurance and specifically denied offering her an 800 number to check on the health plan that would be offered if the employees went non-union. Trujillo denied asking Brill to check with other employees and to report back to him.

Teresa Martinez testified that she had never heard that Trujillo had asked Brill to speak with other employees concerning withdrawing their support for the Union. Jim Lopez similarly testified that while Brill had discussed with him the question of whether he supported the Union, she never asked him on behalf of Angelo.

As with much of her testimony, Brill appeared to improvise and embellish her testimony and I was not favorably impressed with her demeanor. The credible testimony of both Martinez and Lopez related to this issue is inconsistent with that of Brill regarding the conversations she had with them, which casts doubt on the accuracy of Brill's testimony regarding her conversations with Trujillo. Brill's claim that Trujillo enlisted her to speak with other employees about going non-union after she told him about her husband's terminal medical condition and the importance of keeping the Union health plan seems unlikely, especially since Trujillo knew that she was the steward and, according to Brill, he began the conversation by expressing concern about the propriety of his inquiry. Trujillo's account that Brill seemingly supported decertification is not implausible, considering the indications in the record that Brill was manipulative and engaged in half- truths, exaggeration and a willingness to mislead others to advance her interests.

Trujillo's testimony regarding the conversation he described and his denial that the two follow-up conversations occurred was more credibly offered and more probable than Brill's inconsistent testimony. I do not credit Brill's testimony regarding the initial conversation with Trujillo that she described and I do not credit her testimony regarding two follow-up

conversations. I credit Trujillo's testimony that management was not involved in his decision to have the conversation with Brill.

The testimony of Trujillo establishes that he questioned Brill about her union sympathies and the union sympathies of other employees. Trujillo was a supervisor and agent, but there is an absence of credible and probative evidence that the Respondent encouraged, authorized or ratified his questioning of Brill or that the Respondent acted in such manner as to lead employees reasonably to believe that Trujillo acted on behalf of management regarding decertification.

Under these circumstances, the activities of Trujillo did not violate the Act because he was a member of the collective-bargaining unit by the agreement of the Union and the Employer. *Montgomery Ward & Co.,* 115 NLRB 645 (1956), enfd. 242 F.2d 497 (2d Cir. 1957), cert. denied 355 U.S. 829 (1957); *Food Mart Eureka, Inc.,* 323 NLRB 1288 (1997).

The General Counsel does not urge that the decision in *Montgomery Ward* and the many cases citing it with approval should be abandoned. The General Counsel would distinguish the present case by first arguing that Brill's testimony that Trujillo made a veiled threat to Brill by telling her that if it got "out" that he had asked for her help in his decertification efforts he would know who had said anything. The General Counsel next contends that the Employer violated the Act by the remarks Brill testified Trujillo made in two follow-up conversations. Because I have not credited Brill's testimony relied on by the General Counsel, I need not determine whether those statements would be unlawful under the *Montgomery Ward* standards.

In view of the foregoing, I shall recommend that these allegations be dismissed.

b. Alleged statements by Weathersby

The consolidated complaint in cases 28-CA-17671 and 28-CA-17859 alleges as follows:

> 6(e) On or about October 12, 2001, the Respondent, by L.C. Weathersby, herein called Weathersby, at the Respondent's facility, threatened employees by informing them that they should not seek the assistance of the Union for the resolution of store-level issues.
>
> 6(f) On or about October 12, 2001, the Respondent, by Weathersby, at the Respondent's facility, threatened its employees with unspecified reprisals for contacting the Union.

Each of these allegations addresses a single conversation between Trujillo and Brill with no one else present. Brill described a brief conversation with Weathersby on the sales floor regarding the number of hours she had been assigned. Brill testified:

> I asked him about my hours and how come they were reduced and that's when he told me he would look in on it and see what was going on. He then told me that I needed to quit calling the Union so much and that we needed to resolve this at store level, that he had an open-door policy and that I needed to go to him instead of the Union all the time.

Brill testified that the conversation occurred in late October. She testified that she approached Weathersby after she was scheduled for 20 hours one week. A review of the schedules discloses that she was scheduled for 20 hours the week beginning October 14.

Weathersby denied the conversation described by Brill. He testified that he did have a meeting with Union representative Allen Frescus[7] and Brill regarding his open door policy. He testified that at the meeting he told Brill:

> I as the store director cannot solve a problem if you do not come to me, and I -- I reiterated that I do have an open door policy. You're free to go to the Union, but I would like to also know, you know, what the problem is so maybe I -- I can stop the problem, because there's going to be me and you and the Union anyway but I would like to -- to know if there's anything going in my store, that's what I'm there for, to solve the problem.

There is no other alleged Section 8(a)(1) conduct by Weathersby. Frescus was the Union agent assigned to Store 917. Although present at the hearing, Frescus did not testify. Brill did not testify regarding a meeting that included Frescus as described by Weathersby. Based upon considerations of demeanor and the probabilities, I credit Weathersby's denial of the conversation described by Brill. The credible and probative evidence does not show that Weathersby threatened its employees with unspecified reprisals for contacting the Union.

The alleged unlawful statements by Weathersby are not established by credible evidence and I shall recommend that these allegations be dismissed.

c. Alleged statements by Trujillo the week of October 21

The consolidated complaint in cases 28-CA-17671 and 28-CA-17859 alleges as follows:

> 6(g) On or about the week beginning October 21, 2001, on a specific date presently unknown to the undersigned, but which date is known to the Respondent, the Respondent, by Trujillo, at the Respondent's facility, threatened its employees with unspecified reprisals if they supported the Union.

The Respondent contends on brief that no evidence was introduced to support this allegation. No specific evidence has been associated with the allegation and no additional information regarding the nature of the alleged threat or the identity of the threatened employees has been provided. A complaint allegation that identifies who committed an unlawful act, states in general terms what was done, approximately when it was done and the general location where it occurred is ordinarily found to be legally sufficient to inform a respondent of the issues to be considered at trial. However, where the allegation is as non-specific as the one at issue, the record is extensive and the evidence relating to the allegation is not obvious and has not been identified, an administrative law judge is handicapped in determining whether the alleged violation is supported by evidence. Under such circumstances, dismissal of the allegation is justified. Nevertheless, I have reviewed of the record and I have found no substantial and probative evidence that supports this allegation. Accordingly I shall recommend that the allegation be dismissed.

[7] His name is also spelled Frescas in the transcript.

d. Alleged promises and threats by Trujillo between November and February

The consolidated complaint in cases 28-CA-17671 and 28-CA-17859 alleges as follows:

> 6(h) Between November 2001 and February 2002, on a specific date presently unknown to the undersigned, but which date is known to the Respondent, the Respondent, by Trujillo, at the Respondent's facility, promised its employees improved working hours if the employees decertified the Union as their collective-bargaining representative.
>
> 6(i) Between November 2001 and February 2002, on specific dates presently unknown to the undersigned, but which dates are known to the Respondent, the Respondent, by Trujillo, at the Respondent's facility, threatened employees with reduced working hours if they continued to support the Union.

Ortega testified that sometime during the period November through February Trujillo solicited her support for decertification and at that time told her that without the union he would have more control over the amount of hours that he gives each department. Trujillo denied telling Ortega or other employees that they would receive more hours if the Union was voted out. The statement described by Ortega seems illogical. The expired contract does not address the allocation of employee hours between the various functions in the meat department and there is no substantial evidence that the deli hours where Ortega worked had been limited because the employees were represented. After describing the asserted remark, Ortega volunteered, in what impressed me as a defensive tone, " I don't know what the union had to do with that, but that's what he had said, if we could get the union out, he would have more control." In her volunteered testimony she did not reiterate that Trujillo said that deli employees would receive more hours if the Union was voted out. There is no evidence that in conversations Trujillo had with Ortega when other employees were present that he said that deli employees would be assigned more hours if the Union was decertified.

Based upon the probabilities and considerations of demeanor, I credit Trujillo's denial that he promised Ortega or other employees more hours if they voted the Union out.

Ortega testified that in the same conversation Trujillo told her that he could get rid of unproductive employees a lot easier without the Union. Trujillo expressed to Ortega his opinion that she would be the decisive swing voter in a decertification election, which he called the sweet vote. In February Ortega told him that she would not vote the Union out. Trujillo told her that he understood.

There is an absence of evidence that the Respondent encouraged, authorized or ratified Trujillo's solicitation of Ortega's support for decertification or the arguments he made to Ortega regarding what he viewed as advantages of the meat department being non-union. Trujillo's statements that he would have increased discretion and that employees could more easily be terminated for low production without union representation were not unprivileged threats and promises in the context they were uttered. His actions were not unlawful under the principles of *Montgomery Ward & Co.,* 115 NLRB 645 (1956), enfd. 242 F.2d 497 (2d Cir. 1957), cert. denied 355 U.S. 829 (1957). In view of the foregoing, I shall recommend dismissal of these allegations.

e. Alleged statements by Trujillo on or about March 30

The consolidated complaint in cases 28-CA-17671 and 28-CA-17859 alleges as follows:

> 6(j) On or about March 30, 2002, the Respondent, by Trujillo, at the Respondent's facility, threatened its employees with reduced working hours if they supported the Union.

This allegation apparently refers to a conversation Ortega testified occurred in late March when she initiated a conversation with Trujillo about her hours. She testified that she asked about her hours and "[H]e told me that he cut my hours, because I was no longer a productive member of the team. And that my work was not up to par." Ortega did not testify that there was any mention of the Union. The evidence is insufficient to establish that Ortega was threatened with reduced working hours if employees supported the Union. I shall recommend that this allegation be dismissed.

f. Alleged interrogation of employees by Trujillo on June 21, 2002

The consolidated complaint in cases 28-CA-17671 and 28-CA-17859 was amended at the hearing to allege as follows:

> 6(k) On or about June 21, 2002, the Respondent, by and through Trujillo, at the Respondent's facility, interrogated employees about their participation and testimony in a hearing before the National Labor Relations Board.

This allegation refers to a single conversation between Trujillo and Christine Ortega with no one else present. Ortega testified that that the conversation happened one week before the opening of the hearing in this matter. Ortega described the conversation as follows:

> Well, he was standing where I needed to go, because the shrimp was above his head, and it's awkward, you know. I said, I need some shrimp, and he turned around, and he did hand me the shrimp, the case of shrimp. And he asked me, said what day are you going to court…. And I said I didn't know. And he said, well, what are you going to say…. I didn't say anything. And you know, he didn't push it or anything…

Trujillo specifically denied asking Ortega what she was going to say and described the following version of the conversation:

> She was getting product to fill her seafood counter…. There was a lot of silence at first. I was kind of feeling uncomfortable…. I told her, you know, you're going to court, too? And she said, yeah, well, I got to go to court. I don't know why. And you know, I have nothing to do with this. I said, you know what, Christine, you know, that has to do with you. That has to do with you, with the Union. I says, you know, yeah. And then, you know, I tried to abort the conversation, and she goes, well, I don't have nothing [sic] to do with it, Angelo, and you know, this has nothing to do with me, and I'm going to go to Labor Relations, and this and that. And you know, she almost…started crying…. I just told her, you know what, I says, you know, that's between you guys, and I left it at that.

Considering the demeanor of the witnesses and the probabilities I am not convinced that either version of the conversation is a completely accurate account, although Trujillo's appears to be more probable. Ortega's testimony that Trujillo abruptly asked her "What are you going to say?" after asking her what day she was going to court was unconvincing. I credit Trujillo's denial that he asked her what she would say at the hearing. I conclude that the conversation was more extensive and more emotionally charged than the one described by Ortega. Trujillo's

testimony appeared to be an attempt to truthfully relate the substance of the conversation, but was not a verbatim account.

It is improbable that Trujillo did not know that Ortega would be a witness, since she was an alleged discriminatee. Trujillo's asking Ortega if she was also going to court appears to have been an impulsive response to tension. It was Ortega who opened a discussion of her involvement. The credible evidence is insufficient to establish a Section 8(a)(1) violation. Accordingly, I shall recommend dismissal of this allegation.

3. Evidence of discrimination against Anthony Martinez and preliminary conclusions

The consolidated complaint in cases 28-CA-17671 and 28-CA-17859 alleges the following as a violation of Section 8(a)(1) and (3):

> 7(d) In or about the week beginning October 28, 2001, on a specific date presently unknown to the undersigned, but which date is known to the Respondent, the Respondent issued its employee Anthony Martinez an undeserved and unwarranted written warning.

Martinez is a meat cutter and is Brill's nephew. There is an absence of evidence of that the written warning alleged was issued to Martinez.

Martinez did testify that in a conversation in October in the grocery back room Trujillo told him that he did not think that Martinez had gotten as much work done the night before as he should have. Martinez testified that Trujillo "probably said it was because I was talking to [Brill]." The record does not show that the counseling was unjustified. A few weeks earlier Trujillo had told Martinez that he was a good worker and that he wanted their relationship to stay professional and not be affected by "what was happening" between him and Brill. This was shortly after the charge in case 28-CA-17522 was filed naming both Brill and Trujillo.

Other than a verbal warning that Weathersby gave Martinez in the fall regarding not filling a meat case, Martinez has received no other discipline. Both Trujillo and Weathersby describe Martinez as being a good employee.

To set forth a violation in dual motive Section 8(a)(1), (3) and (4) discrimination cases, the General Counsel is required to show by a preponderance of the evidence that animus against protected activity was a motivating factor in the employer's conduct. To sustain this initial burden, the General Counsel must show (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). See also *Manno Electri*c, 321 NLRB 278 at fn. 12 (1996). Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a fact issue. *FPC Moldings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enforcing 314 NLRB 1169 (1994); *Andrex Industries Corporation*, 328 NLRB No. 180 (August 30, 1999).

If the General Counsel's initial burden is satisfied, the employer may escape liability for its action by either disproving one or more of the critical elements of the General Counsel's case or by establishing as an affirmative defense that the employer would have taken the same

action even in the absence of the employee's protected conduct. *TNT Skypak, Inc*., 312 NLRB 1009, 1010 (1993).

The evidence presented to satisfy the General Counsel's initial burden must be analyzed separately from the employer's defense. *Pace Industrial*, 320 NLRB 661 (1996), enfd. 118 F3d 585 (8th Cir. 1997). Nevertheless, the employer's stated reasons for adverse action against an employee can be considered as a part of the General Counsel's initial burden and if they are pretexts they can support an inference that the employer had an unlawful motive. *Black Entertainment Television,* 324 NLRB 1161 (1997). The entire record may be examined to ascertain whether the adverse action was motivated by protected activity. Thus, in determining whether the evidence presented has satisfied the General Counsel's initial burden, the evidence is not limited to the evidence introduced by the General Counsel, but can also include the reasons advanced by the employer for its action and any additional reasons offered at the hearing. *Williams Contracting*, 309 NLRB 433 (1992).

Martinez was not especially active on behalf of the Union and there is an absence of substantial evidence of employer hostility related to Martinez' union activities. The basis of the asserted violation is not clear. The theory may be that because Trujillo "probably" attributed Martinez's low production to his spending time talking to Brill, I should find that there is a prima facie showing that Martinez was disciplined for talking to Brill because Brill was the Union steward and she had not supported decertification.

The credited testimony of Weathersby establishes that Brill not infrequently stops her work to engage other employees in personal conversation. I decline to infer that Trujillo counseled Martinez in response to conversations Martinez may have had with Brill about the Union or that Trujillo was attempting to limit protected concerted activities. The evidence does not show that the reason Trujillo spoke to Martinez about his productivity was a pretext. Moreover, Trujillo spoke to employees regularly about their productivity.

The evidence does not show that protected activity by either Brill or Martinez was a substantial or motivating reason for Trujillo's counseling of Martinez about his productivity. The General Counsel has not carried the government's burden to establish a prima facie case under *Wright Line* and the evidence also does not establish an independent violation of Section 8(a)(1). Accordingly, I shall recommend that this allegation be dismissed.

4. Alleged discrimination against Bernadiene Brill

a. Evidence regarding discriminatory changes in Brill's work duties in violation of Section 8(a)(1), (3) and (4) and preliminary conclusions

The complaint in cases 28-CA-17671 and 28-CA-17859 alleges the following as violations of Section 8(a)(1) and (3):

> 7(e) Since on or about October 31, 2001, the Respondent has assigned Brill more onerous work duties, including, but not limited to, ordering her to perform the "frozen load" work not ordinarily performed by Brill.
>
> 7(l) Since on or about February 18, 2002, the Respondent has assigned Brill more onerous work, including, but not limited to, breaking down and sorting pallet loads of product and stocking product from the pallet load into the sales case.

The complaint in case 28-CA-18181 alleges as follows as a violation of Section 8(a)(1), (3) and (4):

> 5(c) Since on or about August 11, 2002, the Respondent has assigned Brill to perform less desirable and more onerous tasks.

Store 917 has two refrigerated storage areas for the meat department. One is for frozen product and is referred to as the freezer. The second area is for non-frozen product and is referred to as the cooler. The product is delivered on pallets and placed in the appropriate storage area. The pallets include product that is not Brill's responsibility. Removing product from a pallet is sometimes referred to as "throwing the load". The term "throwing the load" appears frequently in the record and is not a term of precise meaning. It can also refer to removing all the items from the delivery pallet and organizing them in the storage area. The organizing of the items for the different meat department operations is sometimes referred to as stacking or "throwing against the wall". Taking product from storage and placing it in a display case is sometimes referred to as "throwing" the product. When the delivery pallets are received they are covered with plastic sheeting that must be cut off. The initial opening of a pallet is sometimes referred to as "breaking the load", although sometimes that term is used to indicated the cutting off of the clear plastic followed by the removal of everything on the pallet and organizing it or merely removing a needed portion of the newly unwrapped pallet. The multiple meanings assigned with these terms create some confusion in the record.

The allegations in paragraphs 7(e) and 7(l) of the complaint in cases 28-CA-17671 and 28-CA-17859 relate to Brill's being required to take merchandise she was responsible for stocking from pallets. It had been the practice of Jack Salmon, the head meat cutter at Store 917 who preceded Trujillo, to remove the product from the delivery pallets himself. At least at times, Salmon placed Brill's product on a six-wheel cart or in a shopping basket, inferentially at the time the large and heavy meat items that would be processed by the meatcutters was also taken from the pallet. On some occasions Salmon brought product to Brill on the sales floor. Initially Trujillo followed Salmon's practice, but in late October he began requiring Brill to unload the product she was responsible for from the pallets. This had been the practice at Store 937, where Trujillo was trained. Some of the product that was to be processed by the meatcutters is too heavy for Brill to handle and is heavier that the 50 pound limit for her position as specified in the meat wrapper job description. These heavy items are ordinarily on the bottom, but sometimes it is necessary to first move heavy items before Brill's product can be removed. On those occasions the meatcutters, including Trujillo, are available to move the heavy items. Trujillo never required Brill to handle the heavy items. Brill testified that she nevertheless sometimes chose to do this heavy lifting herself. The credible and probative evidence does not show that Brill was ever required to remove all the items from the delivery pallets and organize the product in the storage area, notwithstanding testimony by her that might leave that impression. In particular, she described an incident on February 18 when there was wrapping work to be done when she began her shift, but Trujillo told her to begin by wiping down a display case and "start the load", which Brill said meant "breaking the load". Contrary to the apparent thrust of the complaint allegation, the credible evidence does not show that Brill was ever required to open a pallet and sort all the merchandise. Rather, she was required to cut the plastic on a pallet, remove her product and stock her merchandise in display cases.[8]

[8] Trujillo credibly described in detail Brill's duties and what she has been required to do. See transcript 1054-1062.

At a March 13 meeting where Brill received a warning regarding her work, discussed in detail later, the Union took the position that Trujillo's requirement that Brill take product she was to stock from a delivery pallet and load it on a six wheel cart was not her duty. There has been no contention that Brill's duties did not include taking product from the freezer and cooler; the dispute was limited to taking product from pallets. The record does not show that the question has ever been the subject of a formal grievance and the requirement has not been alleged or urged as a violation of Section 8(a)(5).

The General states on brief that the allegation in paragraph 5(c) in case 28-CA-18181 refers to two distinct violations. The first is that the Respondent continued to require Brill to break and throw loads. The General Counsel has not contended and the record does not show that the Employer materially changed Brill's assignment regarding throwing and breaking loads following the close of the initial hearing in cases 28-CA-17671 and 28-CA-18181. The order reopening the hearing on the complaint in cases 28-CA-17671 and 28-CA-28-CA-17859 and consolidating that complaint with case 28-CA-18181 for hearing specifically stated that it did not grant leave to introduce additional evidence or make additional arguments concerning the merits in cases 28-CA-17671 and 28-CA-17859. There has been no explication of how Brill's work assignment related to throwing and breaking loads should be considered new violations and thus not precluded by my order limiting the reopening of the first hearing, nor has it been explained how the mere continuation of Brill's assignment related to throwing and breaking loads would have evolved into a violation of Section 8(a)(4).

The second asserted violation based upon paragraph 5(c) in case 28-CA-18181 relates to a claim that the Respondent provided Brill with a six-wheel cart that the Employer knew was defective and dangerous and thereby discriminated against her. The witnesses refer to the cart at issue as the green cart. In addition to the green cart there are three similar six wheel carts described as silver carts. All the carts are for common use by the meat department employees. Accordingly, Brill was permitted to use and did use silver carts and other employees used the green cart. She preferred the silver carts, but sometimes all the silver carts were being used by others and only the green cart was available. On occasion, none of the six wheel carts were free and in that circumstance the practice by Brill and others was to use a grocery cart to move merchandise from the freezer or cooler. There was no restriction of using a grocery cart, rather than a six-wheel cart.

Brill preferred to not use the green cart because she had experienced difficulty with it. In September she had taken a load of merchandise to the sales floor using the green cart. As she was unloading the cart it tilted and merchandise fell off. Brill reported the incident to Trujillo. She told him that the green cart was broken and that the wheels were defective. Trujillo told her that he used it all the time and did not have a problem with it and took no further action.

On October 18 Brill was using the green cart to move merchandise to the sales floor when the cart tilted to the side, causing merchandise to fall off and knock her to the floor. She was injured. Following Brill's October injury the green cart was taken out of service. Brill later learned that prior to her injury Anthony Martinez had wrapped plastic sheeting around an axle of the cart to hold a wheel in position on its axle.

Brill acknowledged that all the meat department employees used the green cart and that she used it without problem during the period between the September incident and the October incident when she was injured. Following her injury Martinez told her that he had "fixed it" at some point before Brill was injured. The evidence suggests, but does not establish, that a failure of Martinez's makeshift repair was related to the October incident.

The evidence does not show that management was involved or had knowledge of Martinez's repair. Although other meat department employees used the green cart, the General Counsel does not contend that the Respondent violated the Act by providing the green cart to employees other than Brill.

In support of the allegations of unlawful work assignments to Brill the General Counsel urges a finding that that Trujillo said, in front of Ortega and another butcher block employee, that he was going to see if he could make Brill cry that day. The testimony of Ortega was as follows:

> Q. (By Mr. Irving) Okay…. What would he brag about?
> A. About yelling at Berna or --
> Q. At what?
> A. Yelling at Berna, possibly writing her up. He often did.
> Q. And when you say bragging, how is it that he would express it to you while the other employees were present?
> A. He would be laughing about it, like it was funny that -- Bernadine doesn't get along with Teresa either, so it was like a joke. Let me see if I can make her cry today.
> Q. Okay. And you heard that from Mr. Trujillo?
> A. Yes.

No other employee testified that Trujillo ever said, in substance, that he was going to see if he could make Brill cry. Theresa Martinez credibly testified that she never heard Trujillo say that he wanted to make Brill cry. Ortega demonstrated a propensity to improvise and embellish her testimony and I was not favorably impressed with her demeanor. It is not clear that she intended to testify that Trujillo actually made such a remark, as opposed to her imputing that intent to Trujillo. Assuming that it is her testimony that Trujillo made such a remark, it is not credited. Moreover, the evidence is insufficient to support an inference that such a remark, even if made, was in response to protected employee activity.

The General Counsel also points to testimony by Ortega that Trujillo told her and Theresa Martinez that he would get rid of Brill within 30 days. Ortega's testimony is not credited, based upon considerations of demeanor and the contrary credible testimony of Martinez. Moreover, there is no substantial evidence that such a remark, even if made, was related to the Union, rather than Trujillo's assessment of Brill's job performance.

There is an absence of substantial and probative evidence that protected employee activity, the filing of Board charges or Brill having given testimony under the Act was a substantial or motivating reason for Brill's work assignments. Her assignments to remove the plastic wrap from pallets, to remove merchandise from pallets and the continued use of the green cart after she complained about its condition were subsequent to protected activity by her. The evidence does not show, however, that there was anything more than a coincidental correlation between the protected activity and the assignments. The evidence does not show that the assignments were a pretext to discriminate against Brill.

The General Counsel has not carried the *Wright Line* burden to initially make a prima facie showing of discrimination. I shall therefore recommend that these allegations be dismissed.

b. Evidence and preliminary conclusions regarding a November 26 written warning issued to Brill

The complaint in cases 28-CA-17671 and 28-CA-17859 alleges as follows as violations of Section 8(a)(1), (3) and (4):

> 7(h) On or about November 26, 2001, the Respondent issued Brill an undeserved and unwarranted written warning.

On November 26 Weathersby issued a documented verbal warning to Brill, following a meeting with Trujillo, Brill and a Union representative. The warning related to her job performance on November 23, the day after Thanksgiving, a typically slow day. Brill had worked from 9:30 a.m. to 3:30 p.m. that day. Trujillo testified that when he arrived at work on November 24 he found that the display cases had not been stocked with salt pork, hams and other merchandise that was available in the storage area. Brill testified that she knew that she had not properly stocked the display cases with hams and salt pork and that she would have had time to stock those items, but that she was unable to do so because she could not find the salt pork and hams. She testified that she had asked Anthony Martinez to help her look, but even with his help no salt pork or hams were found. Martinez was called to corroborate Brill on this issue. On direct examination he testified:

> Q. (By Mr. Irving) Do you recall a point during that Friday if Bernadine Brill requested your help in trying to locate some items?
> A. Yeah. She had gone through the load first and didn't find what she was looking for and she asked me to double check to make sure that she just wasn't seeing it.
> Q. Do you recall in particular what items she was looking for?
> A. Ham and salt pork.
> Q. And did you then help her look for it?
> A. Yes. We went through the load, and I didn't see anything.

On cross-examination it became apparent that this testimony may have been technically true, but misleading. Martinez had not looked specifically for hams and salt pork for Brill on November 23, because on that Friday Brill had not told him that she was looking for hams and salt pork. He testified on cross-examination, "At the time, I wasn't sure what I was looking for until Angelo [Trujillo] brought it to our attention [on November 24] that it was the salt pork and the hams. I had looked for anything that was weighable on the truck." This admission was made after it was pointed out to Martinez on cross-examination that he gave an affidavit to the Board on December 3, in which he related what happened on November 23, without mentioning that his aunt had asked him to look for the hams and salt pork.

Trujillo credibly testified that the hams and salt pork and other items were not hidden when he arrived on November 24. The evidence suggests that Brill not only knew that the display cases had not been stocked with salt pork and ham, but that she knew that the product was available in the cooler. Thus, before leaving work on November 23, she reported to Weathersby, "I'm leaving for the day. I'm just letting you know that we're out of chicken and we're out of ground beef, but everything else is done. He said okay…. I wanted to cover myself," As noted above, she concedes that she knew that hams and salt pork needed to be stocked and claims that she had asked Martinez to help her find those specific items. Her version of the hams and salt pork issue is not credited and I find that Martinez's testimony on direct examination does not warrant a different conclusion. I credit Trujillo's convincingly offered and

more probable testimony that Brill, without excuse, failed to stock the salt pork and ham or perform the other tasks mentioned in the warning and described in his testimony.

Only the store director can impose discipline. Weathersby testified that he decided to discipline Brill because her claim that she was not able to find the product was not acceptable, since the product was available.

I conclude that there is an absence of substantial and probative evidence that protected employee activity, the filing of Board charges or Brill having given testimony under the Act was a substantial or motivating reason for the November 26 warning issued to Brill. The evidence does not show that there was anything more than a coincidental correlation between Brill's protected activity and the warning. The evidence does not show that the assignments were a pretext to discriminate against Brill. The General Counsel has not carried the *Wright Line* burden to initially make a prima facie showing of discrimination. Assuming, without deciding, that a prima facie showing has been made, I find that the Employer has established that the same action would have been taken even in the absence of the employee's protected conduct. I shall therefore recommend that this allegation be dismissed.

c. Evidence and preliminary conclusions regarding an unalleged December 10 counseling of Brill

Evidence was admitted regarding a December 10 written warning that was drafted by Trujillo, but not signed or issued by Weathersby and that was discussed at a meeting. The warning was not issued and is not alleged as a violation

The warning was drafted by Weathersby and concerned tasks not performed by Brill. Weathersby, Trujillo, Brill and a Union representative met at the store. Trujillo credibly testified that on December 3 he told Brill to perform the tasks mentioned in the draft warning and that she did not do the work. Brill contended that she had not been told that the tasks were her responsibility. The Union agent and Weathersby agreed that Trujillo should prepare a list of Brill's duties. Brill objected on the ground that she did not want to be treated as a child and that she knew her job. Weathersby testified that he did not conclude that the warning lacked merit, but that he nevertheless told her, "We've had numerous counseling sessions in the past, but I would go ahead and tear this up, but I wanted to stress the importance that she needed to get the job done."

On brief the General Counsel does not urge that a violation be found regarding this unalleged incident, but contends that it is "evidence of Trujillo's efforts to grasp at reasons, including unwarranted reasons, to retaliate against Brill." Assuming, without deciding, that this incident should be considered as possible violation, the evidence does not establish that this counseling of Brill was unwarranted and the evidence is insufficient to support a finding of an unalleged violation of the Act. More particularly, I conclude that there is an absence of substantial and probative evidence that protected employee activity, the filing of Board charges or Brill having given testimony under the Act was a substantial or motivating reason for the warning that was not issued or the December 10 meeting. The General Counsel has not carried the *Wright Line* burden to initially make a prima facie showing of discrimination. Assuming, without deciding, that a prima facie showing has been made, I find that the Employer has established that the same action would have been taken even in the absence of the employee's protected conduct. Moreover, the evidence does not establish an independent violation of Section 8(a)(1). I conclude that the evidence does not establish a violation.

d. Evidence regarding an alleged February 20 written warning issued to Brill and preliminary conclusions

The complaint in cases 28-CA-17671 and 28-CA-17859 alleges the following as a violation of Section 8(a)(1), (3) and (4):

> 7(m) On or about February 20, 2002, the Respondent issued Brill an undeserved and unwarranted written warning.

There is an absence of evidence that a written warning was issued to Brill on or about February 20 and there is no indication that the allegation refers to a written warning on a different date. The only incident involving Brill on February 20 was that Trujillo spoke to Brill about the pace of her work.

On February 20 a box of product had fallen on Brill. Trujillo learned of the accident from another employee. Trujillo credibly testified that he asked Brill if she needed to see a doctor or go home and she said that she was okay. Brill testified that later that day, after she had filed an accident report and returned to her work duties Trujillo called her aside and told her, "[I]t's unfortunate that you hurt yourself today, but you need to pick up the pace. It's taking you way too long to get this load thrown. If this persists, I've already warned you about it. You will be written up on Friday." There is no evidence that she received such a written warning and there is no evidence that the incident described by Brill was documented by the Employer. Trujillo testified that he did not recall if he spoke to Brill that day about the speed of her work. In the absence of a specific denial of the conversation described by Brill, I credit the substance of her account.

Assuming, without deciding, that this evidence should be considered as a possible Section 8(a)(1) violation, a violation is not established by the evidence.

e. Evidence regarding an alleged March 13 written warning issued to Brill and preliminary conclusions

The complaint in cases 28-CA-17671 and 28-CA-17859 alleges the following as violations of Section 8(a)(1), (3) and (4):

> 7(n) On or about March 13, 2002, the Respondent issued Brill an undeserved and unwarranted written warning.

This allegation refers to a written warning given to Brill on March 8. The warning was delivered at a meeting at Store 917. Attending were Trujillo, Brill, Weathersby, Union agent Frescus and Anna Gallegos, described as being a front-end manager. It is unclear whether Gallegos was an active participant or merely in the office on other business.

The warning states, "Bernadine has been warned several times about amount of work being done in a timely matter. It took Bernadine a hour and a half to throw 30 cases of product in a case." The warning stated that further such problems would result in suspension or termination.

Brill's assigned task that was the subject of the warning was to take prepackaged product from a delivery pallet in a refrigerated storage area, put it on a six wheel cart, take the product to a display case and put the product in the display case. At the meeting Frescus said

that taking the product from the pallet was not in Brill's job description. Trujillo took the contrary position. Trujillo had begun assigning Brill this duty some months earlier.

The fact that the March 13 warning for alleged poor productivity was related to Brill's job performance in the context of being required to take product off a pallet is the central fact relied on by the General Counsel. Alice Kozlowski was a wrapper at Store 937 and was held out by Respondent as being a good worker. At store 937 her duties included stocking product in a manner similar to the situation involved in Brill's warning. Called by Respondent, she stated in response to a hypothetical question with facts similar to those in the Brill situation that it would take her about 90 minutes to accomplish the task. Apparently surprised by this testimony, Respondent's counsel cross-examined her and secured a concession that she had opined in pretrial discussions with him that the hypothetical task would require only 60 minutes. There is insufficient probative evidence to establish whether 90 minutes was a longer than reasonable time to accomplish the task at issue.

I conclude that there is an absence of substantial and probative evidence that protected employee activity, the filing of Board charges or Brill having given testimony under the Act was a substantial or motivating reason for this warning issued to Brill. The evidence does not show that there was anything more than a coincidental correlation between Brill's protected activity and the warning. The evidence does not show that the warning was a pretext to discriminate against Brill. The General Counsel has not carried the *Wright Line* burden to initially make a prima facie showing of discrimination. I shall therefore recommend that this allegation be dismissed.

f. Evidence regarding an alleged April 20 written warning and preliminary conclusions

The complaint in cases 28-CA-17671 and 28-CA-17859 alleges the following as a violation of Section 8(a)(1) and (3):

> 7(p) On or about April 20, 2002, the Respondent issued Brill an undeserved and unwarranted written warning.

On April 20 a warning was delivered at a meeting at the store. Present were Trujillo, Brill, Union agent Frescus and an unidentified woman. Weathersby had signed the warning, but he was not present. Grocery manager Doug Cheshire attended. The warning stated:

> It took Bernadine an excessive amount of time to fill the retail meat case, approximately 2 hours. As discussed previously, this kind of production is unacceptable.

At the meeting Trujillo reiterated what was stated in the written warning. Brill testified:

> Q. Is this true what happened on April 12th?
> A. t's hard for me to remember what -- but I know that it does take me a while to put these loads out…it's just constantly on me for speed and for -- to hurry up, and you know, labor and so –

Brill testified, in substance, that the time that she took to complete her assignments was not deficient, taking into consideration the requirement imposed by Trujillo that she take product off a delivery pallet and load it on a cart.

The evidence does not affirmatively prove that April 20 warning issued to Brill was unwarranted or undeserved. I conclude that there is an absence of substantial and probative evidence that protected employee activity was a substantial or motivating reason for this warning issued to Brill. The evidence does not show that the warning was a pretext to discriminate against Brill. The General Counsel has not carried the *Wright Line* burden to initially make a prima facie showing of discrimination. I shall therefore recommend that this allegation be dismissed.

5. Evidence regarding denial of make-up work to Brill for negotiation time and preliminary conclusions

At the hearing evidence was admitted, over the Employer's objection, that Brill lost hours in October because she participated in negotiations on her regularly scheduled work days and was not assigned shifts on different days to make up the time she took off. The Employer's objection was that the issue was not properly raised by the pleadings and the objection was raised again on brief. The General Counsel contends that the matter is sufficiently placed in issue by paragraphs 7(a) and 7(c) of the complaint in cases 28-CA-17671 and 28-CA-17859. Paragraph 7(a) alleges reductions in Brill's scheduled hours in violation of Section 8(a)(1) and (3). Paragraph 7(c) alleges the modification of Brill's starting and quitting times alleges a reduction in Brill's scheduled hours in violation of Section 8(a)(1), (3) and (4). The Employer's objection has arguable merit. However, I decline to reconsider my ruling. It is clear that the evidence does not establish a violation.

According to Brill, she had attended negotiations three years earlier and was allowed to work on a day she was normally off when negotiations were on her regularly scheduled workday. This assertion is not supported with any records. The collective-bargaining unit is a single store unit. In 2001 negotiations were apparently conducted jointly for several stores and employees from various stores attended, with negotiations handled principally by Union representatives. Brill asked for and received time off to attend contract negotiations in 2001. Brill testified that Trujillo complied with her requests to not be scheduled on days when negotiations were held. According to Brill, Trujillo entered "conflict" on the schedule when she attended negotiations. The record does not establish the dates when the negotiations were conducted and Brill was present. In this regard, no negotiation schedules or minutes were offered.

On brief the General Counsel points to evidence that during the weeks beginning October 14 and 28, Brill's scheduled hours dropped to 28 hours per week and that during three weeks in October, five days on Brill's schedule have been marked by Trujillo as "conflict". The General Counsel maintains that the evidence shows that, unlike in previous negotiations, Brill lost hours in 2001 as a result of her participation in negotiations.

Thus, the General Counsel seems to argue that because the notation "conflict" appears on the schedule those were days when Brill was absent for contract negotiations. However, the evidence is that the notation "conflict" does not necessarily indicate days Brill was absent for negotiations. A calendar where employees note their scheduling requests indicates that on the two days in the week of October 14 when Brill had "conflicts" noted, she had not asked to be taken off schedule for negotiations. In fact, the stated reasons she was unavailable to work on those days were that she had a doctor's appointment and was going on a personal trip out of town. An examination of the schedules shows that Brill and other employees have the notation "conflict" on days that have not been shown to be related to negotiations or the various NLRB hearings.

The calendar pages in evidence also show that employees, including Brill, sometimes merely indicated on the calendar that they needed off on a particular day, without stating a reason. Trujillo simply did not schedule the employees and merely noted "off" on the weekly schedule, the same notation that he used when the employee was not scheduled for reasons unrelated to employee preference. Examples include Brill on September 24 and October 2. Trujillo credibly testified that it was his practice to accommodate employees requests noted on the calendar.

This is not to say that Brill did not take days off to attend negotiations. Trujillo agreed that he took Brill off schedule, at her request, to permit her to attend negotiation meetings. The record does not establish, however, when or how many days she took off for that purpose.

Brill did not testify regarding the details of the arrangements three years earlier and the evidence does not establish that the staffing considerations were comparable. Weathersby and Trujillo were not working at Store 917 three years earlier and the evidence does not show that they were aware of how the situation was handled at Store 917 during past negotiations at the time of the scheduling at issue. Before coming to Store 917 Weathersby was store director in another of Respondent's stores where the employees were represented. He credibly testified that at that other organized store there was no policy for allowing employees to make up hours when they took time off to attend negotiations and such a procedure had not been followed in the other union stores where he had worked. Trujillo was unfamiliar with such a policy or practice. The evidence does not show that the Employer had a general policy to allow employees to make up lost time spent in negotiations.

Brill approached Weathersby on one occasion and asked to work on a Thursday to make up time she had lost to attend negotiations. Thursday was not a day she normally worked. Weathersby told her that it was not possible. He testified that at that time the target for labor cost was not being met and a wrapper was not needed on Thursday. The relevant dates are not disclosed. The evidence does not show that Weathersby's assessment of the need for a wrapper on that Thursday was not accurate. The collective-bargaining agreement provides that part-time employees, if scheduled, must be scheduled for a minimum of four hours.

The scheduling of Brill for the period of October 14 through December 16, when the weekly schedules note "conflict" are summarized below.[9] The numbers of hours include 8 hours for weeks where the schedule indicates holiday or anniversary (a paid holiday).

| Week beginning | Hours/days scheduled |
|---|---|
| 10/14/01 | 28 hours – "conflict" on Wednesday and Friday |
| 10/21/01 | 30 hours - "conflict" on Sunday and Monday |
| 10/28/01 | 28 hours - "conflict" on Tuesday |
| 11/04/01 | 30 hours |
| 11/11/01 | 30 hours - "conflict" on Tuesday |
| 11/18/01 | 32 hours worked |
| 11/25/01 | 30 hours |
| 12/02/01 | 30 hours |
| 12/09/02 | 30 hours - "conflict" on Monday |

[9] In this decision numbers of hours scheduled have been rounded off.

I conclude that there is an absence of substantial and probative evidence that protected employee activity, the filing of Board charges or Brill having given testimony under the Act was a substantial or motivating reason for the Employer's denial of make-up work to Brill for time she took off for negotiation. The evidence does not establish that the denial of make-up assignments were pretexts to discriminate against Brill. The General Counsel has not carried the government's *Wright Line* burden to initially make a prima facie showing of discrimination. Assuming, without finding, that the denial of makeup time is sufficient to make a prima facie showing, I find that the Employer has established that the same action would have been taken even in the absence of employee-protected conduct. I shall therefore recommend that no violation be found regarding the denial of make-up time to Brill.

6. Evidence regarding changing of start and end times of Brill's shift in October and preliminary conclusions

The complaint in cases 28-CA-17671 and 28-CA-17859 alleges the following as violations of Section 8(a)(1), (3) and (4):

> 7(c) Since on or about October 21, 2001, the Respondent has adversely modified the scheduled starting and quitting times of Brill.

At the time Trujillo became head meat cutter Brill's shifts usually began at 7:00 a.m. Trujillo changed Brill's schedule to usually begin at 8:30 a.m., except on Wednesday, the day that specials were advertised. This change was made the week of June 17, the first week Trujillo appeared on the work schedule. This was over a month prior to Trujillo's initial discussion with Brill about the Union. The change in the schedule was made at the same time that Trujillo discontinued the previous practice of meat being cut at night and leaving it to be wrapped the next morning. Because of this change of the time when meat was cut, there was no longer a need for a meat wrapper first thing in the morning. There is no evidence that the discontinuance of the cutting of meat to be wrapped the following morning was based on other than privileged business considerations.

On October 29 Brill's schedule was adjusted to usually start at 9:30 a.m. The testimony of Merrick Dean, the assistant head meat cutter, establishes that when this change in Brill's schedule was made there was nothing available to wrap until 9:30 or 10:00 a.m. Accordingly, the evidence does not show the change in starting time was arbitrary or not for legitimate business reasons.

I conclude that there is an absence of substantial and probative evidence that protected employee activity, the filing of Board charges or Brill having given testimony under the Act was a substantial or motivating reason for changes made in Brill's starting and quitting times. The evidence does not show that there was anything more than a coincidental correlation between the protected activity and the changes. The evidence does not establish that the assignments were pretexts to discriminate against Brill. The General Counsel has not carried the government's *Wright Line* burden to initially make a prima facie showing of discrimination. I shall therefore recommend that these allegations be dismissed.

7. Evidence regarding the ordering of Brill's spouse to leave the store and preliminary conclusions

The complaint in cases 28-CA-17671 and 28-CA-17859 alleges the following as violations of Section 8(a)(1), (3) and (4):

> 7(f) On or about November 9, 2001, the Respondent, by Trujillo, at the Respondent's facility, affected the working conditions of Brill by ordering her spouse to leave the Respondent's facility.

In November Trujillo was cutting meat behind a large window that looked out onto sales area of the Store 917 meat department. Brill was wrapping meat and carrying it in trays out to display cases. At one point Trujillo noticed Brill come in from the sales area and take a single tray of meat, rather than the usual rack of several trays, and return to the sales area. Trujillo then became aware that Brill's husband, Curtis Brill, was angrily glaring at him through the window from a point near the window. Trujillo turned away, but when he turned back after a few minutes Curtis Brill was still there, glaring at him and speaking to him through the glass. Trujillo could not hear him. At that point Trujillo waved to Mr. Brill to leave and said (although his words would not have been heard) that he should move away. There is no evidence that Trujillo directed provocative gestures or remarks at Mr. Brill. Mr. Brill continued to glare at Trujillo and mouth words at him. Trujillo then paged Weathersby to come to the meat department, put down his knife and went out on to the sales floor. When Trujillo stepped into the sales area Mr. Brill approached him rapidly and Trujillo said that he and Bernadine Brill had a lot of work to do and that Mr. Brill was going to have to leave the department. Mr. Brill began yelling angrily in Trujillo's face and told Trujillo that he was going to "kick his ass." Weathersby arrived and Mr. Brill was persuaded to leave the store. There is no evidence that force or inappropriate means were used to convince Mr. Brill to leave to leave the store following his threat to assault Trujillo. Mr. Brill's behavior was not unprecedented. He had engaged in comparable conduct with Trujillo's predecessor, Jack Salmon, and had invited Salmon to "go outside".

The foregoing is based upon a composite of the credibly offered and probable portions of the testimony of Trujillo, Bernadine Brill, Louis Saavedra, Weathersby, Jack Salmon and Christine Ortega. Trujillo was the only witness who described what occurred before he went out on the sales floor. Mr. Brill was at the hearing, but did not testify. I draw an adverse inference against the General Counsel for not calling him to testify regarding this incident. Specifically, I conclude that had he testified he would have corroborated the testimony of Trujillo. I find that Ms. Brill's testimony that is inconsistent with the foregoing was not convincingly offered and was less probable.

I conclude that there is an absence of substantial and probative evidence that protected employee activity, the filing of Board charges or Bernadine Brill having given testimony under the Act was a substantial or motivating reason for the actions taken regarding Mr. Brill. To the contrary, Mr. Brill's conduct seems indefensible. The response of Trujillo and Weathersby was measured and appropriate. The General Counsel has not carried the government's *Wright Line* burden to initially make a prima facie showing of discrimination. I shall therefore recommend that this allegation be dismissed.

### 8. Evidence that the Respondent more closely scrutinized and supervised the work of Brill and preliminary conclusions.

The complaint in cases 28-CA-17671 and 28-CA-17859 alleges the following as violations of Section 8(a)(1), (3) and (4).

> 7(k) Since on or about December 30, 2001, the Respondent has more closely scrutinized and supervised the work of Brill.

This non-specific allegation apparently is meant to address, in a general way, Trujillo's supervision of Brill as evidenced by the warnings and counseling she received. Thus, on brief

the General Counsel contends that the April 20 warning discussed supra is evidence of closer scrutiny of her work. In addition, evidence was admitted that Trujillo once spoke with Brill about pants she was wearing that he did not consider to be in compliance with the Employer's dress code. Brill disagreed with his interpretation and complained to Weathersby that she was being picked on. She did not wear the pants again. Trujillo also counseled other employees about the dress code. On another occasion Trujillo reminded employees about the Employer's limitations on using a store telephone. Trujillo took pictures of display cases and once remarked to Ortega, "This is how you write someone up." On that occasion Ortega related that he moved a package of chicken to show an empty area (a "hole") in the case. The General Counsel apparently contends by moving a package of chicken to show an empty section in the display case Trujillo created a false illusion of an under-stocked case. The evidence does not support such a conclusion. The expectation was that the display cases would be kept full of product. If the display case had been full, moving a single package of chicken would not have created a hole. The record does not show that the picture was used to issue a warning to Brill.

I conclude that there is an absence of substantial and probative evidence that protected employee activity, the filing of Board charges or Bernadine Brill having given testimony under the Act was a substantial or motivating reason for Trujillo's supervision of Brill. The General Counsel has not carried the government's *Wright Line* burden to initially make a prima facie showing of discrimination. Moreover, the evidence affirmatively shows that Trujillo's supervision of Brill was motivated by business considerations unrelated to her protected activities. I shall therefore recommend that these allegations be dismissed.

9. Evidence that Brill, Saavedra and Ortega were scheduled less hours

The Employer is a nation-wide grocery store chain. Store 917 receives its corporate management directives from a district sales manager, who in turn receives his directives from a division office in Phoenix, Arizona. The Employer's stores, including Store 917, receive projections of sales and expenses at the beginning of each quarter of the fiscal year that begins February 1. The projections are broken down by department. Each store director and department manager, including Trujillo, are required to sign quarterly profit and loss projections for their area of responsibility, committing themselves to meeting the projections. Thus, the projections are objectives that are expected to be achieved. The store directors and department managers are evaluated on their success in meeting the objectives. As head meat clerk Trujillo is personally responsible for scheduling when meat department employees work and how many hours they work.

The meat department quarterly projections for labor cost are stated as a percentage of sales. This management approach for controlling labor costs is not new and there is no evidence that it is a strategy that was implemented to defeat protected employee activity. The initial quarterly projections are typically revised and are not firmly established until about two weeks into the quarter. The meat department employees are scheduled for one-week periods. The usual practice is for meat department manager to schedule employees for as few hours as seems reasonable early in the quarter to avoid creating a problem later in the quarter and missing the final sales/labor ratio. It is an accepted organization truism that if the meat department exceeds projected labor early in the quarter, the time will never be entirely regained. Because sales volume is affected by holidays, seasonal demand, sales promotions and other considerations, the staffing of the meat department varies somewhat from week to week. Thus, if the department is correctly staffed one week and an increased sales volume is expected for the following week, more employee hours would be justified. If instead, sales are expected to drop, fewer employee hours would are justified. Late in a quarter sales promotions can be

adjusted in response to department's profit/loss position for the quarter, taking into account the labor/sales figures at that time.

The record reflects that the Employer's rank and file employees can be promoted to management positions. Lisa Goodman, the meat market manager who supervised Trujillo before his move to Store 917, was promoted to a management position after three years as a meat market manager and now supervises meat operations for Respondent's 28 New Mexico stores. Thus, while Trujillo's wages and working conditions in the represented unit are established by collective bargaining, his success in meeting the meat department quarterly objectives can affect his advancement to higher management positions. Trujillo's demeanor and the tenor of his testimony show him to be an ambitious person. The record demonstrates that he is management-oriented and that he has a personal incentive to "make the numbers".

When Trujillo prepares the weekly schedules for the meat department employees, he follows an established procedure, with occasional deviations as required by business exigencies. He begins by assigning himself to work six days and 48 hours, which is expected by higher management. He assigns the assistant manager of the department to work 40 hours, including working on Trujillo's day off. Butcher block supervisor Theresa Martinez is assigned 40 hours. The next assignment of hours is to full time meat cutter Anthony Martinez, who typically is scheduled for about 40 hours. After making these assignments Trujillo assigns butcher block clerks Christine Ortega or Deniece Gonzales to be on duty to close the butcher block operation. On days when the butcher block supervisor works she ordinarily opens that operation. When she does not handle the opening, Gonzales, Ortega or one of the meatcutters is scheduled to open the butcher block. Consistent with instructions from higher management, the butcher block is open 12 hours a day, with coverage by two employees during especially busy periods. Trujillo then determines how many hours should be assigned to part time meat cutter Saavedra, how many additional hours should be assigned to Ortega and Gonzales and how many hours should be assigned to Brill, considering the business volume expected and the labor cost/sales ratio. Relevant considerations in making these decisions include the ability of meatcutters to perform any function in the department, the limited function of the meat wrapper classification and the lack of a need for a full time wrapper. There is also a meat deli clerk, Jim Lopez, but it is somewhat unclear how his scheduling is handled. The meat deli appears to be subject to separate accounting. The scheduling of the meat deli clerk is not material to the issues in the case.

a. Evidence regarding scheduling Brill fewer hours and preliminary conclusions

The complaint in cases 28-CA-17671 and 28-CA-17859 allege the following as a violation of Section 8(a)(1) and (3):

> 7(a) Since on or about September 23, 2001, the Respondent has reduced the scheduled working hours of its employee Bernadiene Brill….

The complaint in case 28-CA-18181 alleges the following as a violation of Section 8(a)(1), (3) and (4):

> 5(a) Since on or about August 11, 2002, the Respondent has reduced the scheduled and actual working hours of Bernadiene Brill.

As a part-time employee, Brill's scheduled hours fluctuated. In some cases the actual hours she worked are different than the scheduled hours. The collective-bargaining agreement provides for vacation time, holiday pay for five common holidays, plus the employee's birthday,

employment anniversary day and a personal holiday. Accordingly, the number of hours she is paid each week is sometimes greater than the number of hours scheduled and worked. There are inconsistencies between what a paid day off is called on the schedule and what it is called on the payroll history. The inconsistencies are not material.

During the calendar year 2000 and in 2001, before Trujillo became Brill's supervisor in June, she was typically scheduled for about 30 hours per week. Beginning on June 17, the date Trujillo took over the job of scheduling the meat department employees, through the week beginning October 14, Brill averaged 35 hours per week.

Beginning the week of October 21 through the week beginning February 10, 2002, Brill was scheduled for an average of 30 hours per week. The last six weeks of this period Brill was on light duty and was scheduled for 30 hours per week, mostly outside the meat department. The week following Brill's move to light duty status, meat cutter Joey Gabbert was added to the meat department schedule, thereby increasing the number of meatcutters from four to five.

During the period February 17, 2002, through April 20, 2002, the nine-week period following her return from light duty, Brill was assigned 24 hours per week, as many or more hours than Gabbert was scheduled. During this period sales in the meat department were down almost 20% from the previous year. For the next eight weeks that she worked Brill was scheduled for an average of 30 hours weekly.

Set forth in the following table are the weekly hours Brill was scheduled, starting with the week ending August 3, 2002 through the week ending October 26, 2002. The percentage change in sales and the change in the number of meat department hours compared with the 13 week period in 2001 (starting with the week ending August 4, 2001) are stated.

| Week ending | Brill hours scheduled | 2002 dept. hours increase (decrease) | 2002 % dept sales increase (decrease)[10] |
|---|---|---|---|
| 8/03/02 | 36 | (4) | (24.4) |
| 8/10/02 | 37 | (44) | (14.8) |
| 8/17/02 | 16 | (30) | (18.2) |
| 8/24/02 | 22 | (25) | (22.3) |
| 8/31/02 | 26 | (38) | (16.5) |
| 9/07/02 | 22 | (8) | (27.1) |
| 9/14/02 | 12 | (26) | (19.7) |
| 9/21/02 | 12 | 4 | (13.5) |
| 9/28/02 | 30 | 12 | (21.1) |
| 10/05/02 | 22 | 46 | (26.6) |
| 10/12/02 | 16 | (43) | (11) |
| 10/19/02 | 16 | (22) | (23.9) |
| 10/26/02 | 8 | (68) | (28.2) |

The figures in the table are consistent with testimony that sales were substantially lower during this period. In addition to reduced need for a wrapper because of the reduced sales, Brill asked for time off on some days that she would ordinarily be scheduled.

[10] The accounting week ends on Thursday. The sales change figures are for the week ending on the Thursday preceding the 2002 date in the table.

I conclude that there is an absence of substantial and probative evidence that protected employee activity and the filing of Board charges or employees having given testimony under the Act was a substantial or motivating reason for the number of hours Brill was assigned to work. The General Counsel has not carried the government's *Wright Line* burden to initially make a prima facie showing of discrimination. Moreover, the evidence affirmatively shows that Trujillo's assignment of hours to Brill was motivated by business considerations unrelated to protected employee activities. The hours she was assigned were consistent with the need for her services, the overall staffing of the department, her part-time status and the Employer's established management objectives for labor. I shall therefore recommend that these allegations be dismissed.

b. Evidence regarding scheduling Saavedra for fewer hours and preliminary conclusions

The complaint in cases 28-CA-17671 and 28-CA-17859 allege the following as a violation of Section 8(a)(1) and (3):

> 7(b) Since on or about October 3, 2001, the Respondent has reduced the scheduled working hours of its employee Saavedra.

The complaint in case 28-CA-18181 alleges the following as a violation of Section 8(a)(1), (3) and (4):

> 5(b) Since on or about August 18, 2002, the Respondent has reduced the scheduled and actual working hours of Louis Saavedra.

Saavedra transferred to Store 917 from another Albertson's store in April. He had responded to a posting for a part-time meat cutter position. At the time Saavedra began working at Store 917 he was the least senior meat cutter in the department, which consisted of five meatcutters, including Trujillo. Saavedra testified that based on his conversation with the then meat market manager he understood that he was a part-time employee and that he could expect to work between 30 and 40 hours per week.

Starting with the week beginning April 22 through the week beginning June 10 (the last week before Trujillo began) Saavedra averaged 28 hours per scheduled week, excluding one week the was on vacation. During the period he had the following number of weekly hours scheduled:

34 hours – 1 week
32 hours – 2 weeks
30 hours – 1 week
26 hours – 2 weeks
18 hours - 1 week

After Trujillo came to Store 917 Saavedra averaged 37 hours per week and was never scheduled for less than thirty hours until the week beginning February 17, when he was scheduled for 16 hours. That week the assistant head meat cutter was scheduled for only 32 hours, rather than his usual 40, and full time meat cutter Martinez was assigned less than his usual 40 hours. Joseph Gabbert, a part-time meat cutter who started the week beginning January 13, was given only eight hours.

Gabbert was added to the schedule on January 13, following the departure of another meat cutter and Brill's move to light duty outside the department. Gabbert transferred to Store 917 from another Albertson's store. He had responded to a posting for a part-time meat cutter position. He apparent had worked occasionally as a temporary employee at Store 917 in the past. With Gabbert, the complement of meatcutters was restore to five, including Trujillo. There has been no contention that Gabbert was hired based for other than legitimate business considerations. Five meatcutters were viewed as needed to cover days off. There has been no contention that the Employer was not privileged to use part-time meatcutters. A review of the schedules for the first five weeks Gabbert worked show that the combined weekly hours of Gabbert and Saavedra were sometimes well in excess of 40 hours. A comparison of the hours Saavedra and Gabbert were scheduled shows that when these part-time meatcutters were assigned different numbers of hours in a week, the more senior Saavedra ordinarily received a greater number of hours.

Beginning with the week of February 17 through the week beginning June 16, 2002, Saavedra averaged 27 hours per week. This includes the period when sales in the meat department were down sharply from the previous year. During this period he was scheduled the following number of weekly hours:

40 hours – 3 weeks
35 hours – 1 week
32 hours - 3 weeks
30 hours – 1 week
28 hours – 1 week
24 hours - 4 weeks
20 hours – 1 week
16 hours – 4 weeks

Starting with the week of July 28, 2002 through the week beginning February 9, 2003, Saavedra averaged 27 hours per week and had the following number of weekly hours scheduled:

40 hours – 10 weeks
37 hours – 1 week
32 hours – 1 week
30 hours – 2 weeks
28 hours – 1 week
24 hours – 1 week
23 hours – 1 week
18 hours – 2 weeks
16 hours – 3 weeks
14 hours – 1 week
12 hours – 1 week
08 hours – 3 weeks
(vacation – 2 weeks)

During this period Trujillo was not scheduled for more than his customary and expected 48 hours. The second and third most senior meatcutters were full time employees Merrick Dean and Anthony Martinez. During this period they were not scheduled for more than 40 hours. With one exception, Gabbert was scheduled for zero hours during this period whenever Saavedra was scheduled for less than 40 hours. The one exception was the week of November 3, 2003, when Saavedra was scheduled for 30 hours and Gabbert for six. The evidence presented by the

Employer of business volume is consistent with the need for fewer meat-cutting hours. There is an absence of persuasive evidence that by contract or past practice the Employer would have been expected to reduce the hours of full-time meatcutters to give more hours to part-time employees like Saavedra.

I conclude that there is an absence of substantial and probative evidence that protected employee activity, the filing of Board charges or employees having given testimony under the Act was a substantial or motivating reason for the number of hours Saavedra was assigned to work. The General Counsel has not carried the government's *Wright Line* burden to initially make a prima facie showing of discrimination. Moreover, the evidence affirmatively shows that Trujillo's assignment of hours to Saavedra was motivated by business considerations unrelated to protected employee activities. The hours he was assigned were consistent with the need for his services, the overall staffing of the department, his part-time status and the Employer's established management objectives for labor. I shall therefore recommend that these allegations be dismissed.

c. Evidence regarding scheduling Ortega for fewer hours and preliminary conclusions

The complaint in cases 28-CA-17671 and 28-CA-17859 allege the following as a violation of Section 8(a)(1) and (3):

> 7(q) Since on or about February 24, 2002, the Respondent has reduced the scheduled working hours of its employee Christine Ortega

Christine Ortega has worked at Store 917 as a butcher block clerk since February 2001. The General Counsel contends that Ortega's hours were reduced to less than 40 hours per week beginning in mid-February 2002, as a consequence of her discussion with Trujillo that month, discussed supra, when she told him that she would not support decertification.

There are three butcher block employees. They are scheduled by Trujillo. Theresa Martinez has the title of butcher block supervisor. The Employer denied at the hearing that Martinez is a supervisor and the record does not show her to be a Section 2(11) supervisor or a Section 2(13) agent. Christine Ortega and Deniece Gonzales are butcher block clerks. Ortega is more senior than Gonzales. Martinez typically works 40 hours per week, presumably because of her position.

Trujillo did not necessarily schedule Ortega for 40 hours before he scheduled hours for Gonzales. On occasion each of them were scheduled for less than 40 hours and were each assigned the same number of hours. This practice began prior to Trujillo learning that Ortega would not support decertification.

The weekly scheduling of Gonzales and Ortega for the three month period preceding the alleged discrimination in scheduling, through the week beginning June 16, discloses that with one exception, when Ortega was assigned less than 40 hours weekly, she was not scheduled for fewer hours than Gonzales. The one exception was a day that she had a scheduling conflict. Ortega testified that in late March she asked about her hours and Trujillo said that he cut her hours because "I was no longer a productive member of the team. And that my work was not up to par." According to Ortega, Trujillo said that he was going to do a six-hour shift five days a week for Ortega and Gonzales and that Teresa Martinez had agreed. Ortega testified that Martinez later told her that she had not agreed. The hearsay account of what Theresa Martinez said regarding this issue is given little weight.

I conclude that there is an absence of substantial and probative evidence that protected employee activity was a substantial or motivating reason for the number of hours the Respondent scheduled Ortega. The General Counsel has not carried the *Wright Line* burden to initially make a prima facie showing of discrimination. I shall therefore recommend that this allegation be dismissed.

The General Counsel contends on brief that before mid-February 2002 Ortega was scheduled for two opening shifts, but thereafter was not so scheduled. There is no complaint allegation that this asserted change in assigning her opening shifts was a violation, a finding of a violation is not specifically urged on brief and the matter was not fully litigated. Nevertheless, the evidence will be summarized and conclusions offered should the Board conclude that the scheduling of Ortega for opening shifts be considered as a possible violation.

Ortega considered opening shifts to be more desirable. Ortega testified that prior to mid–February she was assigned an 8:00 a.m. to 4:30 p.m. butcher block opening shift two days a week, on the days when butcher block supervisor Theresa Martinez was off. She testified that after she told Trujillo that she would not support decertification Trujillo began criticizing the pace of her work and began assigning the butcher block opening duties to meatcutter Gabbert. Meatcutters are permitted under the expired contract to perform butcher block duties. In addition, Gabbert is a former butcher block supervisor who would be familiar with butcher block operations.

A review of the scheduling records for the first six months of 2002 discloses that Ortega was less often assigned to the opening butcher block shift when Martinez was off and on those days Gabbert started work at or before 8:00 a.m. However, beginning prior to February Gabbert routinely was scheduled to begin work at 8:00 a.m. or earlier without regard to whether Martinez was scheduled.

There is an absence of substantial and probative evidence that protected employee activity was a substantial or motivating reason for the scheduling of Ortega for fewer opening shifts. The evidence is insufficient to establish a prima facie showing of discrimination.

10. Evidence of discrimination against Louis Saavedra

a. Evidence regarding Saavedra's written warning for mishandling frozen turkeys and preliminary conclusions

At the hearing the consolidated complaint was amended, over the objection of the Employer, to allege that Respondent violated Section 8(a)(1) and (3) by issuing a written warning to employee Louis Saavedra in November.

On the evening of November 9, a semi-trailer truckload of 15 pallets of frozen turkeys was delivered to the heated backroom at Store 917 between 7:00 p.m. and 8:00 p.m. The turkeys had a value of about $10,000 and were shipped because of the upcoming Thanksgiving holiday. The evidence does not show that Store 917 management had advanced notice that the turkeys would be delivered at that time and the weight of the evidence is that the delivery at that time was unanticipated. Saavedra was the only meatcutter on duty that evening and he was responsible for dealing with the frozen turkeys. Saavedra was scheduled to go off duty at 8:00 p.m. and no meatcutter was scheduled to work until the following morning. Saavedra left at his scheduled time and most of the turkeys remained in the heated backroom overnight. When Trujillo and Dean arrived at work the following morning they moved the turkeys into refrigerated

areas. They rearranged other merchandise to make room for the turkeys and used the produce cooler and the refrigerated meat cutting room to place the turkeys under refrigeration.

On November 10, Weathersby asked Saavedra for an explanation of his handling of the turkeys. His Saavedra's proffered excuse was that had not known the truck was coming in and that there was no room for the turkeys in the freezer. Trujillo prepared a written warning that was approved by Weathersby and given to Saavedra on November 12, with a Union representative present. At the meeting Trujillo asked him Saavedra why he had not put the turkeys under refrigeration and Saavedra offered no further explanation, except to say that if Trujillo had informed him that the truck was coming in they could have shifted things around to make some room. At the hearing Saavedra testified that he had spoken to the front-end manager about the turkey problem before he left on November 9, and had been told that leaving the turkeys overnight without refrigeration "would be fine." Trujillo had not previously offered this explanation.

The front-end manager that evening was Anna Gallegos. Gallegos was called as a witness following Trujillo's account of the November 9 events and related the following version of what occurred. Shortly before her shift ended at 8:00 p.m. that night Saavedra described the problem of the frozen turkeys to her and took her to the back room to view the situation. The turkeys were not Gallegos' responsibility, but she told Saavedra that he needed to call Trujillo and suggested he might call another store to see if it would have space for the turkeys. Saavedra did not call Trujillo, whose number was posted in the meat department. He told Gallegos that calling Trujillo would not do any good. Apparently he moved a few of the turkeys to refrigerated areas and left.

Gallegos testimony regarding the November 9 events was more credibly offered and more probable than that of Saavedra. Gallegos is credited and Saavedra's claim that Gallegos endorsed his plan to leave the turkeys out overnight without refrigeration is not credited.

I conclude that there is an absence of substantial and probative evidence that protected employee activity was a substantial or motivating reason for the written warning issued to Saavedra relating to his handling of the frozen turkeys. The General Counsel has not carried the government's *Wright Line* burden to initially make a prima facie showing of discrimination. Moreover, the evidence affirmatively shows that the warning given to Saavedra was motivated by deficiencies in his job performance. He could have called for assistance and instructions but did not, even after being encouraged to do so by Gallegos. There was, in fact, room in the various refrigerated areas for the turkeys. The General Counsel's contention that Saavedra could not incur overtime without permission to work the turkeys into refrigerated areas is unconvincing. First, Saavedra did not attempt to call Trujillo. He took no steps to contact or have Gallegos contact higher management for assistance, for overtime authorization or permission to use other employees to assist him in resolving what was obviously a major problem. Saavedra did not mention overtime as an excuse when Weathersby and Trujillo asked him for an explanation. Saavedra was himself a former meat department manager and it was not unreasonable for the Employer to expect him to do more. Under the circumstances, the written warning was not disproportionate. I shall recommend that this allegation be dismissed.

b. Evidence regarding closer scrutiny of the work of Saavedra and preliminary conclusions

The complaint in cases 28-CA-17671 and 28-CA-17859 alleges the following as a violation of Section 8(a)(1) and (3):

> 7(g) Since on or about mid-November, 2001, the Respondent has more closely scrutinized and supervised the work of Saavedra.

At the hearing the General Counsel stated that this allegation refers, in part, to the Respondent's supervision of Saavedra concerning his job performance relating to the delivery of the frozen turkeys that culminated in a written warning issued to Saavedra on November 12. In view of my findings and preliminary conclusions regarding the November 12 warning, I conclude that there is an absence of substantial and probative evidence to show that the supervision of Saavedra regarding the frozen turkeys was related to protected employee activity.

General Counsel contends that Trujillo started to more closely scrutinize Saavedra's work months earlier, following a conversation between the two regarding Trujillo's preference for a 401(k) plan and Saavedra's lack of support for Trujillo on the issue. According to Saavedra, Trujillo began questioning him frequently about merchandizing and faulted his job performance. Saavedra testified that the criticism was not justified. He testified, in substance, that Trujillo supervised him in a demeaning fashion and on one occasion had Martinez, a less experienced meatcutter, instruct him on how a procedure should be done. Trujillo denied that he more closely supervised Saavedra.

Although not specifically urged as examples of closer scrutiny and supervision, the evidence relating to warnings Saavedra received in December, discussed below, has been considered.

I conclude that there is an absence of substantial and probative evidence that protected employee activity was a substantial or motivating reason Trujillo's supervision of Saavedra. The evidence shows that Trujillo aggressively supervised the meat department employees and his overriding concern was meeting the Employer's business goals. Trujillo may sometimes have been harsh and disrespectful in his supervision of employees, quick to find fault and to possibly attach greater significance to employee mistakes than had his predecessor. The credible and probative evidence does not establish, however, that Trujillo was motivated by hostility to protected employee activity. The warnings issued to Saavedra have not been shown to be unlawful. Accordingly, the General Counsel has not carried the government's *Wright Line* burden to initially make a prima facie showing of discrimination. The weight of the evidence is that Trujillo was motivated by his intent to meet the Employer's expectations unrelated to the Union and that the same action would have been taken even in the absence of protected employee conduct. Accordingly, I shall recommend that this allegation be dismissed.

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### c. Evidence regarding Saavedra not being permitted to claim hours and preliminary conclusions

The complaint in cases 28-CA-17671 and 28-CA-17859 alleges the following as a violation of Section 8(a)(1) and (3):

> 7(i) On or about December 21, 2001, the Respondent refused to allow Saavedra to claim the hours of a less senior employee.

The complaint in cases 28-CA-17671 and 28-CA-17859 alleges the following as a violation of Section 8(a)(1) and (5):

> 9(a) On or about December 21, 2001, the Respondent refused to allow Saavedra to claim the hours of a less senior employee.

The expired collective-bargaining agreement allows more senior part-time employees to claim the shifts of less senior part-time employees in their classification. Employees may not claim hours from a less senior employee who is scheduled for less than 40 hours a week to increase the claiming employee's own hours to more than 40 hours for that week. Claims must be made within 24 hours of a schedule being posted.

On the schedule for the week beginning December 23, 2001, Saavedra was assigned 30 hours, while Ralph Sanchez, a less senior cutter, was assigned 34. Saavedra, however, would receive 38 hours that week because he would receive an additional eight hours of pay for Christmas, a day he would be off. As a new employee Sanchez would not receive holiday pay. Saavedra testified that a union agent advised Saavedra to claim a shift from Sanchez. Little weight is given to this hearsay testimony. A claim was made and Weathersby denied the claim. If allowed, Saavedra would have been paid for over 40 hours for the week. There is an absence of substantial and probative evidence that Saavedra was entitled to the hours, by past practice or otherwise. Weathersby's decision is not self-evidently inconsistent with the contract and the evidence does not show that Weathersby's decision was motivated by anti-union considerations. Merrick Dean testified that the claiming policy has not changed in the 18 years he has been a Union member and that given his experience he would not have expected Saavedra to be able to claim Sanchez's hours.

I conclude that there is an absence of substantial and probative evidence that protected employee activity was a substantial or motivating reason Weathersby denied Saavedra's claim for Sanchez's hours. Accordingly, the General Counsel has not carried the government's *Wright Line* burden to initially make a prima facie showing of discrimination. The weight of the evidence is that Weathersby did no more than attempt to comply with the expired contract and past practice. I further conclude that there is an absence of substantial and probative evidence that Weathersby acted in a manner inconsistent with the Employer's collective bargaining duty that would support a finding of a refusal to bargain. Accordingly, I shall recommend that these allegations be dismissed.

### d. Evidence that Saavedra was unlawfully warned in December and preliminary conclusions

The complaint in cases 28-CA-17671 and 28-CA-17859 alleges the following as a violation of Section 8(a)(1) and (3):

> 7(j) On or about December 26, 2001, the Respondent issued Saavedra an undeserved and unwarranted documented verbal warning and an undeserved and unwarranted written warning.

This allegation refers to two distinct incidents. Saavedra was disciplined twice in December for asserted deficiencies in customer service. On December 18 a customer called the store and spoke with Trujillo, complaining that the meatcutter had refused to cut some meat for her at about 6:00 p.m. the night before. Saavedra was the meatcutter on duty. Trujillo spoke with butcher block clerk Gonzales, who confirmed the customer report. The customer also spoke by phone with Weathersby. Gonzales gave Weathersby a written statement confirming that Saavedra refused to cut a portion of the meat requested by the customer. It was part of Saavedra's job duties to cut the meat the customer had requested. The product was available.

Weathersby spoke with Saavedra, who offered the excuse that the customer had agreed to come in the next day for the remainder of the meat she wanted to buy. Following his investigation, Weathersby issued a documented verbal warning to Saavedra on December 18.

The second December warning related to a customer complaint that Saavedra had treated her very rudely when she asked him to cut a meat order for her. Weathersby and Trujillo met with Saavedra to discuss the customer complaint on December 22. Saavedra told them that he was unaware that the customer was displeased. Weathersby concluded that a warning was warranted and a written warning issued.

The General Counsel contends that Saavedra was treated more harshly than customer complaints about rudeness by Ortega, herself an alleged discriminatee. Ortega began a course of chemotherapy about six months after she was hired. Weathersby concluded that the chemotherapy affected her demeanor, appearance and job performance and he elected to speak to her about the customer complaints, but did not give her formal warnings. The record does not disclose that there were complaints that she refused to furnish customers merchandise that they wished to purchase. Thus, Ortega's situation is unlike that of Saavedra, who claimed to not even recall his refusal to provide available product to a customers and who had no extenuating circumstances that might warrant leniency when he did not meet the Employer's expectations in dealing with customers.

I conclude that there is an absence of substantial and probative evidence that protected employee activity was a substantial or motivating reason Weathersby issued the warnings to Saavedra. Accordingly, the General Counsel has not carried the government's *Wright Line* burden to initially make a prima facie showing of discrimination. Moreover, the weight of the evidence is that the warnings were justified and would have issued even in the absence of protected employee activity. Accordingly, I shall recommend that these allegations be dismissed.

### e. Evidence that Saavedra was unlawfully warned on April 5 and preliminary conclusions

The complaint in cases 28-CA-17671 and 28-CA-17859 alleges the following as a violation of Section 8(a)(1) and (3):

> 7(o) On or about April 5, 2002, the Respondent issued Saavedra an undeserved and unwarranted written warning.

Saavedra received a written warning on April 5 for failing to fully stock a display case on March 29. Prior to receiving this written warning Trujillo had spoken to Saavedra several times a week, beginning the prior September, as to why product was not displayed. Trujillo had made it clear that he expected the meat department display cases would be kept full. Weathersby had also spoken to Saavedra several times prior to March 29, regarding the display cases not being kept fully stocked.

Trujillo's shift ended at 2:30 p.m. on March 29. Saavedra worked from 11:30 a.m. to 8:00 p.m. Meat sales were slow that day. Before Trujillo left that day he and Weathersby inspected the meat case. Weathersby mentioned a need to fill a hole in the New York strip steak section of a case, described as quality steaks. That product was in the storage area and Trujillo expected that Saavedra would stock that product later in the day. After 3:30 p.m. Saavedra would be the only meat cutter on duty.

Trujillo began work the following morning at 6:00 a.m. When he arrived, he found several holes in the display cases, including Village Market hams, turkeys, baby back ribs, and beef family packs and the quality steaks. Trujillo considered the holes in Village Market hams and

baby back ribs to be particularly important because they were featured ad items and as such there was a large inventory. If the product was not displayed and accordingly not sold, the meat was more likely to go out of date and be discarded.

On April 5 Saavedra and a Union representative met with Weathersby and Trujillo regarding Saavedra's work on March 29. Saavedra claimed that he had filled cases before he left on March 29, with the exception of the quality steaks. Trujillo claimed that he did not have time to stock the steaks. Weathersby and Trujillo did not credit Saavedra because Store 917 was in a neighborhood where meat sales would be expected to be light on March 29, Good Friday. In their experience Weathersby and Trujillo had not seen heavy meat sales between 8:00 p.m. and midnight on Good Friday. Trujillo has not seen the baby back ribs sell down as low as he found them on March 30, even on the Fourth of July when they were a featured ad item.

I conclude that there is an absence of substantial and probative evidence that protected employee activity was a substantial or motivating reason Weathersby issued the April 5 warning to Saavedra. Accordingly, the General Counsel has not carried the government's *Wright Line* burden to initially make a prima facie showing of discrimination. Moreover, the weight of the evidence is that the warning was justified and would have issued even in the absence of protected employee activity. Accordingly, I shall recommend that these allegations be dismissed.

11. Evidence that the Respondent made unlawful unilateral changes regarding photocopying schedules and preliminary conclusions

The complaint in cases 28-CA-17671 and 28-CA-17859 alleges the following as a violation of Section 8(a)(1) and (5):

> 9(b) On or about February 20, 2002, the Respondent promulgated and has since enforced a rule prohibiting employees in the Unit from photocopying the weekly work schedule.

The General Counsel contends that prior to about February 2002 there was an established practice that permitted meat department employees to temporarily remove the posted meat department work schedule to photocopy it. The General Counsel further contends that in February 2002 the Respondent unilaterally prohibited employees from photocopying the schedule.

In February 2002 Union agent Alan Frescus told Brill that Weathersby had told him that Weathersby did not want Brill photocopying the schedule, but that Weathersby had said that the schedules would be furnished to the Union upon request. Brill testified that based upon what Frescus had told her, she made no more photocopies of the meat department schedules.

Brill testified that in the years 1998 and 1999 she photocopied the meat department schedule. The number of times she did this is not disclosed and the record does not establish that management was aware that she had done so. The first time she thereafter photocopied the schedule was in October 2001, over a year after Weathersby came to Store 917.

Some other meat department employees had copied the schedule. Saavedra testified that he had photocopied the schedule and had observed Brill and Anthony Martinez copying the schedule. Details were not provided. Saavedra testified that he copied the schedule to know when he was scheduled and agreed that making his own notes was equally effective. Saavedra

testified he quit making photocopies copies because he learned, apparently informally, that employees were not supposed to photocopy the schedule.

It was Weathersby's policy to not permit photocopying of employee work schedules. He adopted the policy at the store where he worked before his transfer to store 917. Weathersby's stated reason for the policy was is to address privacy and security concerns of employees that their work schedule not be broadly disseminated. The first occasion when he enforced the policy at Store 917 was in about June 2001, when he became aware that a courtesy clerk was making a photocopy of a schedule. He told the clerk of the policy and informed his department heads of the policy. The record does not show that the policy was generally disseminated to employees by the department heads.

There is no contention that the Respondent refused to furnish copies of the schedules to the Union when requested. Brill testified that the Union had no difficulty receiving requested copies of the schedule. There is no contention and no evidence that employees were prohibited from making notes of the content of the posted schedule. The reason advanced by Weathersby for not permitting the schedules to be photocopied is not irrational and the impact on employees' conditions of employment is slight.

The Respondent contends that the evidence does not establish that photocopying work schedules was a term or condition of employment. Assuming, without deciding, that it was, the General Counsel has not proven that there was a unilateral change. Thus, the evidence does not show that the Employer failed to give the Union prior notice and an opportunity to bargain about a prohibition on photocopying schedules. The burden to establish these elements of the alleged violation is on the General Counsel. Accordingly, I draw no adverse inference because the Respondent did not elicit testimony from its witnesses regarding those questions. While not necessary to my conclusion, it is supported by an adverse inference I do draw from the failure of the General Counsel to call Frescus to testify. He was present at the hearing and can be reasonably be assumed to be favorably disposed to the position of the General Counsel. Thus, I infer that if he had been called his testimony would not support the contention that there was a unilateral change.

In view of the foregoing, I shall recommend dismissal of this allegation.

## Conclusions of Law

1. Albertson's, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondent has not engaged in unfair labor practices.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[11]

[11] If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

ORDER

The complaint is dismissed.

Dated: San Francisco, California, this 29th day of September 2003.

_____
Thomas M. Patton
Administrative Law Judge

JD(SF)–61–03
Albuquerque, NM

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

ALBERTSON'S INC.

and

LOCAL 1564, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO

Cases 28-CA-17671
28-CA-17859
28-CA-18181

and

LOUIS E. SAAVEDRA, An Individual

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